

# AGENDA

**Meeting Location:**

Bascom-Tykeson Room—Eugene Public Library  
100 W. 10<sup>th</sup> Avenue  
Eugene, OR 97401

Phone: 541-682-5481  
[www.eugene-or.gov/pc](http://www.eugene-or.gov/pc)

The Eugene Planning Commission welcomes your interest in these agenda items. Feel free to come and go as you please at any of the meetings. This meeting location is wheelchair-accessible. For the hearing impaired, FM assistive-listening devices are available or an interpreter can be provided with 48 hours notice prior to the meeting. Spanish-language interpretation will also be provided with 48 hours notice. To arrange for these services, contact the Planning Division at 541-682-5675.

**MONDAY, NOVEMBER 5, 2012 – REGULAR MEETING (11:30 a.m. to 1:30 p.m.)****11:30 a.m. I. PUBLIC COMMENT**

The Planning Commission reserves 10 minutes at the beginning of this meeting for public comment. The public may comment on any matter, **except for items scheduled for public hearing or public hearing items for which the record has already closed.** Generally, the time limit for public comment is three minutes; however, the Planning Commission reserves the option to reduce the time allowed each speaker based on the number of people requesting to speak.

**11:40 a.m. II. Goodpasture Island PUD: Off-Site Transportation Improvements Remand Deliberation (City File WG 10-3, LUBA No. 2011-049)**

The Planning Commission will deliberate on the issues remanded by LUBA for a Willamette Greenway Permit Application for transportation improvements at the Goodpasture Island Road and Delta Highway interchange, including a new bridge.

Staff: Steve Ochs, 541-682-5453

**1:20 p.m. III. ITEMS FROM COMMISSION AND STAFF**

- A. Other Items from Staff
- B. Other Items from Commission:
- C. Learning: How are we doing?

Commissioners: Steven Baker; Jonathan Belcher; Rick Duncan; Randy Hledik, Chair; John Jaworski; Jeffery Mills; William Randall, Vice Chair



**AGENDA ITEM SUMMARY**  
**November 5, 2012**

**To:** Eugene Planning Commission

**From:** Steve, Ochs, Associate Planner

**Subject:** LUBA Remand: Goodpasture Island PUD: Off-Site Transportation Improvements  
(City File WG 10-3, LUBA No. 2011-049)

**ACTION REQUESTED**

To deliberate on the remand issues sustained by the Oregon Land Use Board of Appeals (LUBA) on this application (WG 10-3) and remanded to the Planning Commission for this action.

**BRIEFING STATEMENT**

The application subject to this remand is a Willamette Greenway Permit approval for transportation improvements including a new bridge at the Goodpasture Island Road/Delta Highway intersection. In June of 2010, the applicant received tentative PUD and Zone Change approval to construct a 583-unit multi-family development on property located at Goodpasture Island Road and Alexander Loop (see PDT 09-1, TIA 09-4 and Z 09-6). As a means of mitigation for the development's impact to the transportation system, the applicant proposed to construct off-site transportation improvements at the Goodpasture Island Road/Delta Highway interchange. These improvements at the Goodpasture Island Road/Delta Highway interchange are completely within public right-of-way and within the adopted boundaries of the Willamette River Greenway.

This initial Hearings Official approval was affirmed by Planning Commission. Willamette Oaks then appealed the Planning Commission's order to the Oregon Land Use Board of Appeals (LUBA), asserting six assignments of error. After considering the parties' briefs and oral arguments, LUBA issued an order that affirms parts of the Planning Commission's decision, but remands the matter back to the Planning Commission for additional findings on two basic issues, discussed below. As LUBA's was a mixed decision, both Willamette Oaks and Goodpasture appealed LUBA's decision to the Court of Appeals. On May 16, 2012, the Court of Appeals affirmed LUBA's decision without issuing an opinion.

Planning Commission held a public hearing regarding the remand issues on October 2, 2012. At the hearing testimony was provided by Michael Farthing and John Lambie on behalf of Willamette Oaks and Mike Robinson, Seth King and Monte Hurley on behalf of the applicant, Goodpasture Partners. Following the hearing, the Planning Commission left the record open for new testimony and evidence for 7 days until October 9, 2012. Written argument from all parties to rebut testimony was allowed until October 16, 2012 and the applicant was given until October 23, 2012 to submit final argument.

As the LUBA decision concluded that the City's findings in the case of both tasks listed below were inadequate; not that the City's conclusion was incorrect, staff has provided an Agenda Item Summary that recommends supporting the Hearings Official's and Planning Commission's previous conclusions on both tasks supported by additional evidence. There was no substantive evidence submitted that staff felt warranted a reversal of the Planning Commission's previous conclusions that the Delta Ponds/Debrick Slough are not a "channel" of the Willamette River and that building transportation infrastructure in right of way in an area designated for open space is inconsistent with Metro Plan and Willakenzie Area Plan provisions.

## **EVIDENTIARY ISSUES**

On October 16, 2012 Michael Farthing submitted rebuttal testimony including a letter from him and from Mr. Lambie. Staff initially forwarded this to Planning Commission in an email dated October 17, 2012. Mike Robinson subsequently sent an email to City staff and Mr. Farthing contending that the letter from Mr. Lambie included new evidence, contrary to the evidentiary timeframe the Planning Commission established. In response, Mr. Farthing withdrew Mr. Lambie's letter and submitted a revised letter of his own, to replace his earlier submittal and thereby remove any reference to Mr. Lambie's inadmissible letter. Because the original October 16, 2012 letter was withdrawn, there is no need for the Planning Commission to formally "reject" it from the record. However, to the extent that Planning Commissioners may have viewed Mr. Lambie's letter, which was withdrawn from the record, staff advises that its contents may not be considered in any way as part of the decision-making process on this remand.

## **PLANNING COMMISSION'S REVIEW ROLE**

The Planning Commission's role is limited to addressing those issues LUBA remanded. The Planning Commission's role can be divided into two general tasks which are outlined below.

**Task 1** - Adoption of findings that consider the State's definitions of "Willamette River" and "channel" at ORS 390.310. The remand directs the Planning Commission to:

- (a) better explain the Hearings Official's and Planning Commission's earlier determination that the Delta Ponds/Debrick Slough area is not part of the Willamette River; or
- (b) change the Planning Commission's earlier determination by now determining that the Delta Ponds/Debrick Slough area *is* part of the River and making different findings and determinations under EC 9.8815(1), (2) and (4) and Metro Plan Policy D-11.

LUBA's decision noted that because the City's Willamette Greenway criteria implement Goal 15, the use of the word "river" in the implementing provisions should have the same meaning as the term is used in Goal 15. ORS 390.310, part of the Willamette Greenway statutes provides a definition of "Willamette River".

**Definitions for ORS 390.310 to 390.368.** As used in ORS 390.310 to 390.368, unless the context requires otherwise:

*“(3) ‘Willamette River’ means that portion of the Willamette River, including all channels of the Willamette River, from its confluence with the Columbia River upstream to Dexter Dam and the Coast Fork of the Willamette River upstream the Cottage Grove Dam.”*

LUBA also notes that “Channel” is defined at ORS 390.310(1) as including “\*\*\*any channel that flows water at ordinary low water mark”. LUBA noted the City should consider the statutory definitions in determining whether the Delta Ponds/Debrick Slough is part of the “Willamette River”.

During this remand process, the applicant surveyed the area and provided evidence that confirmed that the ordinary low water mark in the Willamette River (based on Oregon Department of State Land information) is 1.47 feet lower than the inlet that allows water into the Delta Ponds/Debrick Slough area (see Letter from AKS Engineering dated August 21 with attached Exhibits A – C). Willamette Oaks provided a separate calculation, after alleging error in locating the correct river mile for the riprap channel (see page 3 of John Lambie’s September 28, 2012 report). Mr. Lambie’s calculation resulted in determining the inlet is 0.87 feet higher than ordinary low water. In either case, evidence from both parties indicates that surface water does not flow from the Willamette River to Delta Ponds/Debrick Slough in this location at ordinary low water.

The primary issue left to resolve is whether the presence of groundwater or subsurface water to Delta Ponds/Dedrick Slough relates to the definition of “channel” in the statutes. Based on the information provided at the hearing and during the subsequent open record periods, staff would conclude that the evidence further supports the conclusion that the Delta Ponds/Dedrick Slough does not qualify as channel of the Willamette River, as defined in state statute. The applicant provided findings to support this conclusion as summarized below. Page references to the applicant’s final argument submitted October 23, 2012 are provided below, to assist the Planning Commission in their evaluation of each argument.

- 1) There is not sufficient evidence to conclude whether the groundwater or subsurface water comes from the Willamette River.
  - Landau Associates review of Mr. Lambie’s opined that the source of water flowing in the Delta Pond/Dedrick Slough is not from the Willamette River but rather local and regional groundwater discharge (Final Argument pages 7-9).
  - Insufficient evidence is provided to support the conclusion that the water in the Delta Ponds/Dedrick Slough results from water exchange with the Willamette River. No analysis of soils or other evidence that water permeates the soils was provided (Final Argument pages 9-10).
- 2) Even if a groundwater connection exists, there is no evidence that it would be sufficient to establish the Delta Ponds/Debrick Slough as a “channel.”

- Plain language of ORS 390.310(1) or (3) does not provide that the “Willamette River” includes groundwater flow (Final Argument pages 8 and 11).
- Interpretation to include underground water would set a precedent that the “Willamette River” covers a much wider area beyond the river itself, including areas potentially outside of the Willamette Greenway as well as many developed areas (Final Argument page 8).
- By definition in state statute “ordinary low water” is to be measured in relation to the bank or shoreline which do not relate to groundwater. “Groundwater” is defined as beneath the land surface. Existence of groundwater cannot therefore establish flow at ordinary low water as it is underground and has no relationship to the bank or shoreline elevation (Final Argument pages 8-9).

In addition to confirming that there is no surface connection from the Willamette River to the Delta Ponds/Debrick Slough area, and that subsurface water does not impact flow at ordinary low water, the applicant provided other substantial evidence that the Delta Ponds/Debrick Slough area are not a channel of the Willamette River by:

- Providing information about the history of the area which shows that it area has not functioned as channel and was used as an aggregate mine (Final Argument page 6).
- Providing evidence that the ownership of the area is not consistent with it being part of the Willamette River because the State of Oregon typically holds title to beds of all rivers, and the area is owned by the City of Eugene (Final Argument page 6).
- Providing evidence that the City’s recent Delta Ponds restoration project reconnected this area so a hydrologic connection occurs at ordinary high water, not ordinary low water (Final Argument page 6).
- Confirming that the area is in the Greenway boundary not because it is a river channel or within 150 feet of the Willamette River but because it was identified for resource preservation and/or because it was in public ownership (Final Argument pages 12-13).
- All maps in adopted documents such as the Willakenzie Area Plan (WAP) and other un-adopted documents in the record, such as the Goodpasture Island Study, refer to the area as the Delta Ponds and Debrick Slough (or, Debrick Slough). Every map identifies the Willamette River as being limited to the main stem channel to the west (Final Argument pages 2-3).

Based on the evidence submitted during these remand proceedings, staff recommends that the Planning Commission adopt supplemental findings to reaffirm its earlier decision that this area is not part of the river.

Specifically, staff recommends that the Planning Commission adopt additional findings that consider the State’s definitions of “Willamette River” and “channel” at ORS 390.310. These findings would rely on the information and findings provided by the applicant and would conclude that, as the Delta Ponds/Debrick Slough do not flow water at ordinary low water, they are not a “Channel” as defined at ORS 390.310(1) and, therefore, are not included in the statutory definition of “Willamette River” at ORS 390.310. The additional findings could also rely on the evidence provided by the applicant regarding the history of the area and other

points noted above, as further evidence that the Delta Ponds are not part of the “Willamette River”.

**Task 2 - Adoption of supplemental findings that either:**

- (a) better explain the Hearings Official and Planning Commission’s determination that transportation improvements to the un-zoned Delta Highway right-of-way are not subject to the Metro Plan description of the Parks and Open Space land use designation (Metro Plan II-G-9), Metro Plan policy H-1, plan provisions related to parks and open space; and, a Willakenzie Area Plan (WAP) goal that references the protection and enhancement of land designated park and open space in the Metro Plan. (WAP, p.6.); or,
- (b) change the Planning Commission’s decision by now determining that those parks and open space plan provisions *do* apply and by making findings addressing them.

Willamette Oaks argued to LUBA that ORS 197.175(2)(d) requires the decision on the Willamette Greenway Permit to be consistent with the acknowledged plan and that it is not consistent with one of the WAP goals and with Metro Plan Policy H.1.

*Metro Plan Parks and Recreation Facilities Element Policy H.1*

*H.1 Develop a system of regional-metropolitan recreational activity areas based on a facilities plan for the metropolitan area that includes acquisition, development, and management programs. The Metro Plan and system should include reservoir and hill parks, the Willamette River Greenway, and other river corridors.*

*WAP Goal Page 6*

*“Provide for the protection and enhancement of land designated park and open space in the Metro Plan and the Park and Recreation Plan as well as significant natural resources in the Willakenzie area, including but not limited to, wildlife habitat areas, waterways, view sheds, and significant vegetation”*

LUBA’s decision found insufficient information in the record to explain why the Hearings Official and Planning Commission determined that the Metro Plan and WAP policies related to parks and open space are not applicable to the subject Willamette Greenway Permit. Based on the aspirational nature of Policy H.1 and the WAP goal, staff believes that the Hearings Official and Planning Commission were correct in their original determination, but that supplemental findings are necessary to address this issue and resolve this matter on remand.

The applicant addresses Metro Plan Policy H.1 on pages 10-13 of the Applicant’s Findings of Fact submitted September 11, 2012, noting that it is not an applicable approval criterion for three reasons.

- The Metro Plan itself notes that policies are flexible and do not necessarily require immediate implementation.
- The policy in this case is a planning directive to local governments, and not applicable to individual, quasi-judicial land use applications.
- The plain text of this provision is aspirational in nature as opposed to mandatory (i.e. using the term “should” rather than “shall”).

The applicant also provides additional findings noting that if the Planning Commission finds that Policy H.1 is applicable, it can be found that the application is otherwise consistent with the policy for three reasons.

- The application does not affect parks facilities plans.
- The application does not impact park facilities.
- The development of transportation facilities within existing right of way is consistent with other plan policies.

The applicant addresses the WAP goal on pages 14-17 of the Applicant’s Findings of Fact submitted September 11, 2012, noting that this goal is not an applicable approval criterion for three reasons.

- The WAP establishes that goals are conceptual and have no regulatory value
- The provision is a general planning directive
- The text and context of the WAP offers additional evidence that goals are not regulatory

Although not originally argued at LUBA by the appellant, the applicant’s findings then step through the Metro Plan Park and Recreation Facilities Element objectives and policies as well as some transportation policies, reaching the conclusion that the development is consistent with the WAP parks and open space goal as the development provides maximum open space, is limited to transportation facilities, conforms with use management considerations and is consistent with /WR standards.

During these remand proceedings, the appellant did not provide further evidence or argument contrary to the applicant’s findings. Based on the comprehensive findings provided by the applicant, and the lack of any such argument or evidence to the contrary, staff recommends that the Planning Commission find that the applicant has sufficiently addressed this remand issue as provided for on pages 9-22 of the Applicant’s Findings of Fact submitted September 11, 2012.

#### **STAFF RECOMMENDATION**

Based on the available evidence to date, and consistent with the preceding findings including specific clarifications in response to the LUBA issues remanded, staff recommends that the Planning Commission, after deliberation, take action to adopt supplemental findings as summarized below in the form of a revised final order.



In regards to “Task 1”, the “Willamette River” issue described above, these findings would consider the State’s definitions of “Willamette River” and “channel” at ORS 390.310 and rely on evidence provided by the applicant regarding flow at “ordinary low water” as well as the history of the area to support the Planning Commission’s original conclusion that the Delta/Ponds Debrick Slough are not a “channel” of the Willamette River.

In regards to “Task 2”, the “Parks and Open Space” issue described above, staff recommends that the Planning Commission rely on the applicant’s findings which analyze these policies and goals, and describe how they are not applicable to the proposal and that even if they are found to be applicable, the policies and goals are met by this application.

With these additional findings, staff recommends that the Planning Commission adopt a Final Order affirming approval of the applicant’s Willamette Greenway Permit for Goodpasture Island PUD: Off-Site Transportation Improvements (WG 10-3).

Based on the Planning Commission’s direction, staff will prepare a Final Order for consideration and final action on November 15, 2012.

#### **PUBLIC RECORD**

The entire record is available for review at the Eugene Planning Division offices and has been forwarded to the Planning Commission under separate cover. Staff has also provided an index of all information that was entered into the record at October 2, 2012 public hearing or during the following open record period. The entire record, including oversized exhibits, will also be made available for review at the Planning Commission meeting(s).

#### **FOR MORE INFORMATION:**

Please contact Steve Ochs, Eugene Planning Division, by phone at (541) 682-5453, or by e-mail at [steve.p.ochs@ci.eugene.or.us](mailto:steve.p.ochs@ci.eugene.or.us)